United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-7018

To be argued by

THOMAS A. ROTHWELL

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs-Appellees,

—against—

NATIONAL AUDUBON SOCIETY, INC.,
ROBERT S. ARBIB, JR., ELVIS J. STAHR, JR.,

Defendants,

THE NEW YORK TIMES COMPANY and
ROLAND C. CLEMENT,

Defendants-Appellants.

UNITED STATES COURT OF APPEALS
APR 7 1977
SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

ROTHWELL, CAPPELLO & BERNDTSON
Attorneys for Plaintiffs–Appellees
1730 K Street, N.W.
Washington, D.C. 20006
(202) 785-5025

Of Counsel:

THOMAS A. ROTHWELL
ARTHUR H. BERNDTSON

DICESARE – Printing – Washington, D.C. 20006 – 331-8101

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ISSUES PRESENTED	3
STATEMENT OF OPERATIVE FACTS	4
ARGUMENT	6
CONCLUSION	22

TABLE OF CASES CITED

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) cert. denied 45 U.S.L.W. 3489	13
Curtis Publishing Co. v. Butts, 388 U.S. 190 (1970)	8
Goldwater v. Ginsberg, 414 F.2d 324 (2d Cir. 1969), cert. denied 396 U.S. 1049 (1970)	11
New York Times Co. v. Sullivan, 376 U.S. 245 (1964)	6, 7, 8, 11, 13, 21
Nichols v. Item Publishers, 309 N.Y. 596, 132 N.E.2d 860 (1956)	13
St. Amant v. Thompson, 390 U.S. 727 (1968)	7, 8
Schoepflin v. Coffee, 162 N.Y. 12 (1900)	19
Shenkman v. O'Malley, 2 App. Div. 2d 567, 151 N.Y.S.2d 290 (1956)	13

OTHER AUTHORITIES

Page

Libel and Related Torts, Arthur B. Hanson (1969) . . 14

80 Harvard Law Review (1967), Jerome A. Barron, "Access to the Press–A New First Amendment Right" 15

41 A.L.R.3d 1083 (Right of Reply) 13

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D.,
ROBERT H. WHITE-STEVENS, Ph.D.,

Plaintiffs-Appellees,

—against—

NATIONAL AUDUBON SOCIETY, INC.,
ROBERT S. ARBIB, JR., ELVIS J. STAHR, JR.,

Defendants,

THE NEW YORK TIMES COMPANY and
ROLAND C. CLEMENT,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D., ROBERT H. WHITE-STEVENS, Ph.D.

Defendants-appellants The New York Times Company (hereinafter "Times") and Roland C. Clement (hereinafter "Clement") have appealed from a judgment entered against defendants-appellants on January 7, 1977 (216a)[1] and other

---

[1] For the purposes of this brief, plaintiffs-appellees adopt the system of references to the Joint Appendix as set out in the Brief for Appellant, the New York Times Company, page 2, footnote 1.

subordinate aspects thereof, which judgment and accompanying Order was filed by the Court below on January 10, 1977.

This is the consolidated brief of appellees submitted in opposition to the brief of appellants The New York Times Company and Roland C. Clement, defendants-appellants, and in support of the judgment entered by the Court below.

The background and factual setting that gave rise to the defamation that is the sole basis of plaintiffs' claims concerned the public controversy over the continuing use and ultimate banning of DDT. National Audubon Society (hereinafter "Audubon") was a prominent sponsor of the campaign leading up to the banning of DDT. Clement was a vice president of Audubon; the in-house authority on matters relating to science and biology. The Times followed and reported on this controversy, both editorially and in news stories, as it developed over a ten-year period.

Plaintiffs are each accredited scientists and academicians who frequently debated and published articles critical of the scientific basis and validity of the ban-DDT campaign, both as to the legitimacy of the evidence that was being adduced and the potential world-wide effects of the proposed ban.

Audubon has for many decades conducted and publicized its Christmas Bird Count, utilizing teams of Audubon members including many amateur ornithologists, to conduct a survey of bird life throughout the nation. Audubon published the statistical tabulation of these counts annually in its magazine "American Birds" (formerly "Audubon Field Notes"). These statistics were considered by most authorities to be the most reliable indicator of the ebb and flow of bird populations in North America. (Tr. 368; 471 and 472) (680e; 687e).

Plaintiffs and others noted a correlation between the increased manufacture and use of pesticides, including DDT, and very rapidly increasing bird population, employing Audubon's own data from the Christmas Bird Counts. These observations were in direct contradiction to the Audubon position, which was primarily based on the predictions of a coming extinction of birds, as set out in the widely-publicized book by Rachel Carson, "Silent Spring".

Thus, one pertinent aspect of the debate concerning the effects of DDT on the environment became involved with the growth or decline of avian populations. Clement, in his role of spokesman for National Audubon Society, Inc., and plaintiffs, were protagonists as to this specific issue as it related to the larger DDT controversy. It was against this general background that this controversy arose.

ISSUES PRESENTED

1) Whether the Times, in the absence of direct proof of malice in the sense of hatred, spite or ill-will, is liable to plaintiffs for libel under a set of facts demonstrating: (a) a conscious "adding to" the literal substance of a prior report, and (b) a reckless disregard of the rights of plaintiffs and of the truth or falsity of the defamatory charge published by the Times when the Times was provided with the uncontrovertible facts?

2) Whether the trial court acted properly in confining the proofs to the issues involved in the alleged libel, and refusing to permit defendants to try an anti-DDT case by expanding the parameters of the privilege of reply when there was no evidence offered by defendants of a prior *ad hominem* attack on defendant-appellants by plaintiffs?

3) Whether the application of the First Amendment privilege to the Times under the facts of this case would be tantamount to a denial of the First Amendment rights of plaintiffs to engage in free, robust and open debate in respect to matters of public importance when plaintiffs support an unpopular and minority point of view?

4) Did defendant-appellant Clement libel the plaintiff-appellees?

5) Was the defendant-appellant Clement guilty of actual malice?

6) Should defendant-appellant Clement's motions for summary judgment, for a directed verdict and for N.O.V. have been granted?

STATEMENT OF OPERATIVE FACTS

On August 14, 1972, there appeared in the New York Times newspaper an article headlined "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count." This article appeared under the by-line of the Times reporter John Devlin, and was incorporated in plaintiffs' complaint as Exhibit II (19a).

The basis of this article was a story appearing as the Foreward to the Audubon publication "American Birds" (17a), in an edition dated April, 1972, but not distributed by Audubon until July, 1972. The "American Birds" Foreward was incorporated into the complaint as Exhibit I.

This Foreward came to the attention of Devlin, a long-time nature reporter for the Times. Devlin was familiar with Audubon and its activities, and followed up on this story that he deemed newsworthy. There ensued at least two phone

conversations as between Devlin and Robert S. Arbib (hereinafter "Arbib"), the editor of "American Birds" and the author of the Foreward.

The testimony adduced at trial as to the content of these calls was contradictory as between the Devlin version and the Arbib version thereof. It was agreed that the reporter Devlin had pressed Arbib for names of those who, according to the Foreward, were "being paid to lie, or is parroting something he knows little about." The names were not given in the first phone call; but five names were ultimately made available to Devlin by Arbib.

Arbib testified that he had admonished Devlin that "under no circumstances was he to say that we were calling Mr. Jukes a paid liar or Dr . White-Stevens a paid liar or anything like that." (Tr. 440)

Subsequent to receiving the names from Arbib, Devlin telephoned Jukes, White-Stevens and Spencer. Although Devlin was most vague about the substance of these calls, his notes pertaining thereto have been preserved and were received into evidence (671e, 762e, 766e). Also, the Times story itself contained references to these conversations, including Dr. Spencer's characterization of language in the Foreward as "almost libelous."

Devlin wrote three summaries of his story which were submitted to his editors (769e, 760e, 761e). Both plaintiffs Jukes and White-Stevens wrote to Devlin under dates of August 7, 1972 and August 8, 1972 respectively, enclosing both scholarly and "popular press" support for their minority views in reference to DDT and the analysis of Audubon Bird Count data (689e, 795e). Thus, it was clear that Devlin had contacted three of the five individuals who had been

identified to him by Arbib (whether with or without the warning to which Arbib testified). Two of the three contacted warned Devlin about the libel potential (Spencer and White-Stevens), and two of the three (Jukes and White-Stevens) forwarded material to Devlin that squarely contravened the "paid to lie" charge in the Foreward.

The uncertainties of Devlin's recollection as to dates were at least partially offset by plaintiffs' Exhibit 14, the August 7, 1972 letter from Jukes to Devlin (689e), written subsequent to the phone call from Devlin to Jukes. Also, the evidence is uncontroverted that the Devlin call to Dr. White-Stevens occurred on August 4, 1972 (795e). The Times did not treat the matter as a hot, fast-breaking news story, the date of publication of the Devlin story being August 14, 1972.

On that same day, August 14, 1972, defendant-appellant Clement wrote (over Arbib's signature) a letter commending "Jack Devlin's punchy piece," containing the phraseology "Nor do we like to call people liars, but. . . " (Plaintiffs' Exhibit III, incorporated into the complaint, 20a.)

ARGUMENT

I.

The legal issue in dispute as between plaintiffs and the Times comes down to an appraisal of the necessary quantity and quality of proof that must be adduced to establish whether the August 14, 1972 article had been published "with reckless disregard of whether it was false or not," the alternative definition of actual malice mandated by *New York*

Times Co. v. Sullivan, 376 U.S. 254 (1964). Under this authoritative rule, a truthful publication of another's report is no defense if the publisher knew "that it was false" (the first branch of *Sullivan*) or if the publishing was "with reckless disregard." As to both branches of the *Sullivan* test, a truthful report of another's defamatory falsehood is assumed.

As to the first branch–knowledge–plaintiffs' proofs must approach that of a confession, a prior or subsequent admission by the defendant of its own bad faith and therefore culpability. Since what a defendant knows–the content of Devlin's consciousness, no less–is, in turn, known only to him, it is rare that such evidence could ever be available to a plaintiff.

As to the "reckless disregard" test, such has never been limited to a showing by defendant that in fact the defendant "entertained serious doubts" as to the truth of the matter asserted–"paid liars" in the case at bar. If that were the unvarying rule, the reporter's denial of doubt–his professions of honest, albeit mistaken, belief–would be conclusive. Thus, Devlin–the Times employee–would become the only witness competent to testify as to the presence or absence of liability for defamation on the part of his employer. Such a rule would immunize the Times from all libel risk–except perhaps the risks from either a disgruntled or malicious employee on the one hand, or a most ingenuous and naive reporter on the other.

In the norms of trial experience, self-serving declarations by witnesses, the self-preservation instinct, becomes commonplace. Most reporters in all situations could be expected to proclaim that they did not act with reckless disregard, that they entertained no serious doubts whatsoever as to the truth of the matters reported. The Court in *St.*

Amant v. Thompson, 390 U.S. 727, 732 (1968), alluded to this problem as follows:

> "The defendant in a defamation action... cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. . . . Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

The Court cited as an example of this common sense rule *Curtis Publishing Co. v. Butts*, 388 U.S. 130, at 169-170 (1967). The teaching of this entire line of cases (frequently referred to as "New York Times and its progeny") since *New York Times v. Sullivan* is to the effect that it is for the trier of the fact to decide the issue of recklessness, and that the publisher of the defamatory falsehood may be cross-examined and disbelieved by the jury in spite of protestations of "absence of doubt." The significant statement in *St. Amant* most applicable herein was that "Nothing referred to by the Louisiana courts indicates an awareness by St. Amant of the probable falsity of Albin's statement about Thompson" (390 U.S. at 732). This one statement disposes of the first issue raised by the Times appeal, to the effect that "... the Times accurately reported charges made by the National Audubon Society, Inc.,..." and that therefore "...a jury verdict against the Times was constitutionally impermissible..." The issue and only issue of substance in regard to the Times' first issue presented is that of *Sullivan*-defined malice.

It is also clear that Judge Metzner employed the *St. Amant* test (211a) in stating that "... the jury was justified

in finding clear and convincing proof from the evidence and inferences to be drawn therefrom that the story of August 14, 1972, was published with reckless disregard of whether it was false or not." Judge Metzner concluded his opinion by the denial of the proposition that ". . . the reporter's testimony is not subject to impeachment by the accepted use of cross-examination and contradictory direct testimony." (211a)

The question for this Court then, simply put, is what was the nature of the evidence on which the Court and jury based their assessment of reckless disregard. For it is clear that the jury did not believe Devlin's testimony about his subjective state of mind in writing the August 14, 1972 news story.

The headline of the article served to upgrade and make newsworthy the Devlin article. This headline does not appear in the Foreward to "American Birds"; Devlin disclaimed authorship thereof (Tr. 78); the Times produced no other witnesses.

Devlin contacted three of the five individuals whose identity was furnished by Arbib. Spencer and White-Stevens warned Devlin specifically about defamation; Jukes characterized the attack as mud-slinging.

Devlin received reprints of material from Jukes and White-Stevens (Tr. 101, 102). The material dealt in part with the explosion of bird populations in recent years. The statistics published by Marvin (703e) would seem startling to any literate observer in the light of the Audubon-Clement-Arbib charges. The Pan Am "Clipper" article (847e, 852e) was obviously written for a lay audience, and spelled out the facts pertaining to increases in bird populations. These materials were no more complex or

difficult than the "American Birds" Foreward from which Devlin was in the process of drawing his story.

The notes of Devlin concerning his telephone interviews with Spencer, Jukes and White-Stevens, constitute additional extrinsic evidence for the jury that Devlin was reckless—especially his note "Libel—Wow" (Tr. 131, 132).

All of the above was present in the record at the conclusion of plaintiffs' case. Appellant Times urges on this appeal a subordinate position that this evidence was insufficient to raise a triable issue of reckless disregard. The testimony—uncontroverted—of Jukes and White-Stevens belie this claim. The documentation supplied by these plaintiffs should have at the very least, raised suspicion in the mind of an experienced, sophisticated reporter.

Devlin's attitude and demeanor on the stand was that of a confused person with a failing memory. His repeated "I don't remember" responses, his apparent inability to understand and follow questions, his nonresponsive answers and his evasive answers on cross-examination are painfully clear from a reading of his testimony. Devlin, as an experienced reporter, has obvious and essential language skills, else he could not have long survived in his occupation. These facts, although intangible, may be taken into account in assaying the appropriate weight afforded to his testimony.

The Arbib testimony (presented after the conclusion of plaintiffs' proofs) to the effect that he had warned Devlin about the epithet "liar" constitutes a frontal attack on the First Amendment defenses of the Times. If Arbib is to be believed in this respect, Devlin was no longer engaged in truthful reporting, even prior to August 4, 1972, when he telephoned White-Stevens. The headline of the libelous

publication could no longer be justified or excused; the story would become inaccurate as being incomplete in a most material respect. It is apparent from Devlin's testimony that the newsworthiness of the story focused on the epithetical use of the word "lying." Without this word there would have been no story.

If Arbib was credited by the jury as to his admonition to Devlin, the libel in question clearly becomes that of the Times. For at least ten days prior to publication, the informant Arbib, on whom the Times claim of constitutional privilege must depend, has put Devlin on specific notice that he is not to attribute any such attack to Audubon. If this be the case, then the first branch of the *New York Times v. Sullivan* rule is satisfied; the Times published the defamation in spite of Devlin's prior knowledge of the falsity of that which he was reporting.

Given the antagonistic defenses by Audubon and the Times, the jury was justified on this record to find the Times liable by returning its verdict which must be taken to mean that the jury simply could not credit Devlin's testimony. There are no cases extending First Amendment protection as to knowingly false and defamatory publications by the Times or any other paper. Viewed in this light, it seems inescapable that the rule fashioned by this Court in *Goldwater v. Ginsberg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) should apply. No constitutional protection is necessary or appropriate for knowingly false and defamatory publications.

The second issue raised by the Times is that of the exclusion of DDT-related testimony, and the intemperate terminology often employed in the writings of plaintiffs and others. Some of this material was admitted into evidence

(771e, 1093e, 1096e, 1097e) and was in fact made available to the jury.

This litigation presented some formidable management difficulties for the Court below. The litigation and events leading up thereto occurred in the aftermath of the national debate over the use of DDT, its effects on bird life, the environment and humans. Selecting a jury took considerable time, as many prospective jurors announced themselves as unalterably opposed to DDT, so much so that they felt disqualified to make a fair and impartial judgment as to a DDT-related controversy.

The strategy of defendants was made clear at the outset—they were determined to re-try the DDT controversy and prevail on the basis of the state of public opinion prevailing then and now. To admit evidence and testimony pertaining to the merits and demerits of the public controversy over the continuing use of DDT would have inevitably led to a most protracted trial as well as hopelessly confusing the jury.

Under such circumstances as proposed by defendants, the only way plaintiffs could prevail would have to convince the jury that the United States had been in grievous error in banning the use of DDT, perhaps an impossible burden for any plaintiff to sustain. Accordingly, plaintiffs presented a motion *in limine* requesting the Court's ruling as to the scope and applicability of the "right of reply" as applied to these proceedings.

The defendants failed to produce and offer evidence that would qualify as affording reply justification for the defamation in issue. No writings or other evidence were offered in which plaintiffs defamed these defendants-

appellants. Instead, both sets of defendants offered selections from the writings of plaintiffs that were representative of the plaintiffs engaging in "...debate on public issues [that] should be uninhibited, robust, and wide-open..." *New York Times v. Sullivan*, at 271. (Material in brackets supplied.)

None of the writings of plaintiffs relied on by defendants-appellants, were publicized in the New York Times newspaper or any other periodical of similar circulation or prestige. None of the uninhibited, intemperate and robust language was directed at defendant-appellants. Here, there is an absence of the kind of scurrilous exchange of personalized epithets that characterizes the background of facts in *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3489. The Court below ruled on the selected writings of the plaintiffs offered by the defendants in accordance with the limitations on the right of reply as discussed in 41 A.L.R.3d 1083, as cited in plaintiffs' motion memorandum. *Shenkman v. O'Malley*, 2 App.Div.2d 567, 151 N.Y.S.2d 290 (1956) is also pertinent.

As to the Court below ruling that "paid liar" is libelous *per se*, this ruling is clearly in accordance with New York law. *Nichols v. Item Publishers*, 309 N.Y. 596, 132 N.E.2d 860 (1956).

THE PLAINTIFFS' FIRST AMENDMENT RIGHTS

Although not an issue decided by the Court nor submitted to the jury, the issue is present, at least implicitly, in this appeal. Here we have a situation where scientists have spoken out and contributed to a debate on an issue of public import. According to the testimony of Yannacone (Tr. 335) two of the three plaintiffs were to be silenced by way of

being discredited. This brings to the forefront, as a matter of public policy, the prophetic passage from Arthur B. Hanson, *Libel and Related Torts*, Vol. 1, pg. 110 (1969), a publication of the American Newspaper Publishers Association Foundation, Inc.:

> "As has been noted, the Supreme Court has so far ignored the related problem of access to the press of unpopular ideas. Although the risk to the press of defamation litigation for entering current debate has been substantially reduced, no corresponding right of reply has been granted to the object of criticism. By extending constitutional privilege to criticism of public officials and figures, the effect may be to hamper, rather than encourage, public debate, and discourage honorable men from public service. Individuals may be less willing to participate in public affairs or to comment on current issues if to do so will enable others to defame them with relative impunity. This is a social problem as yet unresolved."

It would be a most bizarre result for the courts to adopt, as a matter of constitutional right, a rule that would extend to one group of advocates—the press—the near-unconditional right to defame those who champion unpopular causes. Extending such a license to the media would inevitably have the effect of silencing those—unlike Buckley—who do not have ready access to a broad public means of expressing their views and replies to attacks by others.

In such a case, one might well ask: "Whose First Amendment?" For in the case at bar it was the defamatory attack on plaintiffs' personal integrity and reputations that was employed as a means of silencing plaintiffs, of denying to

them by defendant-appellants of the very First Amendment protections on which said defendants now rely. Freedom of speech, of the unfettered opportunity to express dissenting and protesting views, is also a privilege and constitutionally guarded right of plaintiffs as well as of defendants.

If the Court should decide to protect the First Amendment rights of the Times, as urged by said appellant, as a practical matter there is no way to do this without depriving plaintiffs of their similar constitutional privileges. If the policy question comes down to a balance as to whose rights take precedence: Those of a prestigious, world renowned paper of more than 900,000 daily circulation, with ready access to the media, for this defendant-appellant is a component of the media? Or should the balance tip in favor of a small group of scientist-professors, who may express their honest convictions in such arenas as are available to them?

Jerome A. Barron in "Access to the Press—A New First Amendment Right," 80 Harv. L. Rev. 1641 (1967) comments:

> "The constitutional armor which *Times* now offers newspapers is predicated on the 'principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' But it is paradoxical that although the libel laws have been emasculated for the benefit of defendant newspapers where the plaintiff is a 'public official,' the Court shows no corresponding concern as to whether debate will in fact be assured. The irony of *Times* and its progeny lies in the unexamined assumption that reducing newspaper exposure to

> libel litigation will remove restraints on expression and lead to an 'informed society.' But in fact the decision creates a new imbalance in the communications process. Purporting to deepen the constitutional guarantee of full expression, the actual effect of the decision is to perpetuate the freedom of a few in a manner adverse to the public interest in uninhibited debate. Unless the *Times* doctrine is deepened to require opportunities for the public figure to reply to a defamatory attack, the *Times* decision will merely serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate."

Under the facts of this case, largely uncontroverted facts, for the Times to achieve constitutional protection for their unprovoked attack on plaintiff-appellees surely makes a shield into a sword. Efforts to silence an opposing point of view by employing defamation as a policy device must not be aided by the judicial recognition of a privilege that would have the effect of suppressing dissent.

II

As to defendant-appellant Roland C. Clement, plaintiff-appellees' case is based upon the following evidence that the trier of fact could properly take into account:

1. Clement was Audubon's Vice President for Biology, "which means that I had overview of the scientific validity of Audubon Society positions." (Tr. 490)

2. Clement, as Vice President of Audubon, advised Arbib of the "paid to lie" syndrome. (Tr. 468)

3. Clement reviewed the text of the Foreward in draft form, and suggested the addition of the words "or parroting something they know little about" at the end of the fifth paragraph. (Tr. 492)[2] He thereby ratified the draft in his "overview" function.

4. Clement made plaintiffs-appellees' names and locations available to Devlin through Arbib. (Tr. 438; 77e)

5. Clement ratified and approved the libelous Times article by a letter written over Arbib's name. (Tr. 463; 20a)

6. Clement had participated in meetings and plans concerning ways and means of silencing by discrediting two of the three plaintiff-appellants, Jukes and White-Stevens, during meetings of the Environmental Defense Fund. (Tr . 340)

7. Clement testified before the jury that Dr. Spencer was dishonest. (Tr. 529-530) Dr. Spencer, although libeled, was not a plaintiff and was not present in the trial court.

8. Clement wrote and testified that plaintiffs and others, including Dr. Norman Berlaug, a Nobel Laureate, were incompetent. (Tr. 520, 529-530)

---

[2]The statement at page 26 of appellant Clement's brief "There is not a shred of evidence in the entire record that any phrase or statement of Mr. Clement's is found in the New York Times article. . . " is confusing in view of the statement at page 25 ". . . and his only suggestion upon reading the Foreward was the addition of the phrase 'or is parroting something he knows little about.' "

9. Clement refused to identify a single error or misinterpretation by the plaintiffs-appellees of the pertinent Bird Count data although offered an opportunity to do so before the jury. (Tr. 527)

10. Clement admitted that plaintiffs-appellees had used correct data, that Bird Count numbers employed by plaintiffs- appellees were correct and not erroneous. (Tr. 527)

11. Clement knew that the liar epithet as applied to plaintiffs-appellees was unwarranted and without foundation. (Tr. 529)

12. Clement had the opportunity to correct and interdict the intemperate language in the Foreword, and failed to do so. (Tr. 510)

13. Throughout the proceedings, Clement by affirmative conduct and demeanor, displayed an unyielding and implacable hostility as to plaintiffs-appellees. Malice, in the sense of animosity, has been evidenced by Clement both in terms of the operative events that were the subject of the action, and in terms of the litigation. Such malice, as displayed by Clement to the jury as a witness in his own behalf, was palpable throughout the trial proceedings. (Tr. 480-481; 529-530; 215a)

In sum, Clement was the original source and authority for the defamation widely broadcast by the August 14, 1972 Times article. Without Clement there would have been no libel. His testimony to the effect that Devlin was warned that Audubon was not calling anyone liars, self-serving though it be, is in itself an implicit acknowledgement by Clement of his moral and legal culpability. (Tr. 440)

The trier of fact determination that Arbib and Audubon were without liability in this matter is highly significant as it shows a careful and precise discernment of where the ultimate responsibility and liability lay within the Audubon staff.

On the issue of whether Clement libeled plaintiffs-appellees, the foregoing discussion of the evidence shows that Clement participated in discussions on how to silence two of the plaintiffs by a scheme to discredit them. He was the source of the part of the Foreward in issue, which Arbib wrote with no knowledge of specifics. He approved the draft of the Foreward with one additional phrase. In effect, that draft was Clement's own words coming back to him in print for his approval. He provided Arbib with the liar context and quickly ratified Devlin's article when it appeared with the letter of congratulations. It is submitted that this deep involvement in the ultimate libels published in both the Times and the Clement letter provided ample evidence to support a finding of liability. In addition the jury had the benefit of observing and hearing him as a witness, particularly in comparison to the other witnesses, including Arbib. Obviously Clement was not a credible witness in his own behalf. Plaintiffs-appellees agree with the principle set out in *Schoepflin v. Coffee*, 162 N.Y. 12, (1900), cited by appellant Clement at pages 26 and 27 of his brief, but distinguish this case on its facts.

The question of whether defendant-appellant Clement was guilty of actual malice is best answered by comparing Clement's statements that plaintiffs-appellants were not dishonest (Tr. 529) with his quick letter of ratification of the New York Times article identifying the plaintiffs-appellees as paid liars (44a) in the light of his part in the operative facts discussed *supra*. The matter is well covered in Judge Metzner's denial of the motion N.O.V. (213a at 214a and 215a):

"Arbib was asked by Devlin for the names of the scientists to whom he was referring as paid liars in the Foreward to the April 1972 issue of American Birds. American Birds is a magazine published by the Society. Arbib told Clement about Devlin's request and Clement was the person who furnished the names. Clement is an officer of the Society with the title of Vice President for Biology, 'which means that I had overview of the scientific validity of Audubon Society positions.'

"Clement knew the purpose for which those names would be used in the Times story. He deliberately called those plaintiffs liars. Clement read the story in the Times on the morning of publication and sent a letter over Arbib's name to the New York Times. This letter referred to 'Jack Devlin's punchy piece,' and went on to say, '[n]or do we like to call people liars, but' those who have misused the bird count data have had the opportunity to learn of their misinterpretations from the Society's explanations. Clement testified that the import of this letter was to rebut the statement that the five named persons were being called liars. He testified that the language in the letter meant that 'we are not calling people liars.' Despite Clement's testimony, the jury was entitled to draw the inference from the letter that Clement did intend to call the five liars.

"No amount of honest controversy regarding the use of the bird count in the D.D.T. controversy can justify this action. There just was no basis for calling the plaintiffs paid liars.

> "Finally, the jury observed Clement on the witness stand. His demeanor and attitude added to the background of the facts which the jury was justified in finding from the evidence. For example, he flatly denied that anyone was being called a liar in the Foreward. The evidence amply supports the verdict of the jury of actual malice as defined in the *Sullivan* case *supra.*"

As to the issue that defendant-appellant Clement's motions for summary judgment, directed verdict and for N.O.V. should have been granted, plaintiffs-appellees argue there was ample evidence of record to support the denials. This evidence has been discussed *supra.*

Singling out the motion for directed verdict as presenting a special situation at the end of plaintiffs' case, there was the strong testimony of Victor Yannecone, Jr., an experienced attorney who was initial counsel for the Environmental Defense Fund. The Yannecone testimony placed Clement at conferences wherein a scheme to destroy the scientific credibility of persons opposing EDF positions was discussed. (Tr. 333, *et seq.*) The name of Dr. Jukes was frequently mentioned, and Dr. White-Stevens was mentioned. However, the scheme would be applied ". . . to anyone that had written something that one of our trustees objected to." (Tr. 340) That category included Dr. Edwards, who had written several articles contrary to the EDF views on DDT. There was the August 14, 1972 Devlin article in the New York Times quoting the Foreward from *American Birds* and Clement's immediate letter of ratification, over Arbib's signature, dated the same date as the article. That letter stated, "Nor do we like to call people liars, but . . .," *supra.* At that point in the trial, Clement was deeply implicated in the libels.

CONCLUSION

The judgments in favor of plaintiffs based on the verdict of the jury and all of the evidence herein should be affirmed.

Respectfully submitted,

ROTHWELL, CAPPELLO & BERNDTSON
Attorneys for Plaintiffs-Appellees
1730 K Street, N.W., Suite 1302
Washington, D.C. 20006

Of Counsel:

Thomas A. Rothwell
Arthur H. Berndtson